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ABSTRACT

The values and norms of Western law are not universally accepted as basic values and norms in other cultures. Therefore, the contractual processes of Western law should not be considered the basic foundation for all foreign policy negotiations. In Western cultures, principles of law are differentiated from other values based on religion, ethics, social tradition, or political power. This differentiation does not exist in other cultures, but many American foreign policies reveal a lack of awareness of this cultural diversity. United States policies would be more realistic and successful if U.S. decision-makers had more understanding of intercultural communication and were more aware of the basic values and modes of thought that are predominant in other cultures. This requires more accurate perceptions of the cultural foundations on which other nations and societies are based, a condition which can be met only with intercultural research and comparative studies in communication. (RN)

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# LAW AND FOREIGN POLICY: PROBLEMS IN INTERCULTURAL COMMUNICATION

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# LAW AND FOREIGN POLICY: PROBLEMS IN INTERCULTURAL COMMUNICATION

(Abstract)

This paper carries the following general themes:

I. 1) Different cultures exist, each identified with preferred values, norms and modes of thought.

2) In Western culture, law has sweeping functions as a directive for reasoning, a language of discourse and communication, and as the axial norm of social behavior and political organisation, because it has been isolated deliberately from such other informing principles as religion, ethics, social tradition and political power.

Analogous processes of differentiation are not recorded in non-Western cultures. Here self-definition and behavioral direction are associated with norms and values that cannot be subsumed by what the West understands as "law".

3) Cultures communicate in greatly diverse ways. They may interact on the plane of one biography or one particular society as well as under the auspices of a multicultural empire, a system of coordinate political organisms, or such special pursuits as commerce. Furthermore, intercultural communication may be unwilled as in the imperceptible diffusion of a language, an art style, a religion or a technique of economic production; or it may be willed as in the deliberate propagation of a set of ideas, the implanting of a form of government, or the introduction of originally alien crops.

4) Foreign policy is a mode of deliberate communication between coordinate political units. As such it reflects in each case the structuring force of culturally dominant motifs.

5) Since law is not uniformly accepted in the multicultural modern world either as a major value, a basic norm, or a symbolic language, it ought not to be viewed as a mainstay of foreign policy-making.

II. The dominance of law-related propositions in many American policies suggests that cultural diversity is not recognized by policy-making agencies as a political reality, and that foreign policies are not cast in the frame of intercultural communication. It appears, next, that some of these policies would have been more realistic and successful than they proved to be if opposite dispositions had prevailed. A reorientation in these respects presupposes accurate perceptions of the cultural matrix in which each modern state is comprehended, and this condition, again, can be met only with the aid of cross-cultural research and comparative studies.

# I

In a recent survey of present relations between his country and the United states, Japan's foreign minister, Mr. Masayoshi Ohira, argued forcefully that any talk of policy objectives presupposed "deep mutual understanding and mutual trust".[1] "When we view our actual relationship in this light," he continued, "I am sorry to say this mutual understanding and mutual trust are not yet sufficient or satisfactory either in Japan or in the United States." This explains, he concludes, why "(T)he relationship....has not really matured." The major impediment to effective communication, Mr. Ohira tells us, is to le found in cultural differences, and among these he singles out differing orientations toward law. For whereas Americans emphasize contractual obligations, "....in our country this feeling of contractual relationship is weak." Even as he chided the U.S. for a regrettable "attention gap"[2], he therefore insisted upon cautioning his countrymen that improvements in relations with America will be forthcoming only when they realize that "promises impose on us very rigorous obligations and that we have to go about fulfilling them in a very rigorous manner."

Analogous official reminders of the need for intercultural understanding in the conduct of foreign relations are infrequent in American policy planning circles, and suggestions that law might not be a transculturally valid reference are altogether missing. In the particular case of Japan it is evidently being taken for granted today as it was at the end of the Second World War that contractual terms of rendering the idea of obligation are as valid there as they are here. For had not Japan accepted a contractual form of government when it aggreed to a democratic

constitution on the Western model, and had it not contracted to surrender on the basis of a treaty replete with obligations, among them the commitment to renounce war as a sovereign right and the threat or use of force as a means of settling international disputes? Most importantly from the American point of view, had not Japan prospered both politically and economically as a result precisely of the multiple interlocking legal contexts into which it has allowed itself to be fitted, and is one not entitled to assume therefore that political development is rightly projected by our foreign policies in accordance with norms and values dominant in the West?

Questions such as these may not have been tested adequately in the early 1940s when scholars and policy makers were engaged in estimating Japanese reactions to defeat.[3] At any rate, it is clear after three decades of technically close alignments that "development" along lines suggested from without has not foreclosed remembrance of the past within, and that it is, in the final analysis, Japan's own culture which directs the uses of transplanted institutions and assigns meanings to imported words.[4] Communication in the sense of "mutual understanding" is thus clearly dependent not only on Japan's appreciation of the role of law in the United States, but also on American familiarity with Japan's inner order of controlling norms and values. Indeed, our failure to perceive Japanese dispositions toward law in general and contractual obligations in particular is almost incomprehensible in light of several circumstances.

With inequality the natural corollary of defeat, the United States had the advantage, after all, of planning the restructuring of the alien

Asian society in deliberate, methodical ways. Given this difficult yet privileged position it is surprising that the representatives of a common law nation tutored in respect for precedent, did not fall back on precedents which Japan itself had set as a sovereign powerful state when it decided to adopt certain legal codes from continental Europe. In this case the borrowings were also explicit and massive; yet they too failed to inactivate traditional, non-contractual guidelines for the conduct of human relations. And this impression of a resilient, self-contained culture is greatly reenforced when one recalls those centuries of intense Sino-Japanese communications during which Japan totally transformed the sinified version of India's Buddhist faith so as to harmonize its norms with pre-existing spiritual modes. It is this intellectually most successful process which explains why no serious American student of Zen Buddhism is likely to doubt today that he is dealing with an authentically Japanese religion. Likewise, and perhaps more immediately to the point, no reader either of the traditional Tale of Genji or of modern Japanese novels as for example those by Kawabata or Mishima, is apt to mistake the codes of honor, etiquette and social obligation he there encounters as "contractual relations" in the Western sense.

Ideas, then, do not appear transferable in their authenticity from one distinct thought world to the other. As Spengler remarked in his reflections on intercultural relations, what matters is not the original meaning of the forms, but the forms themselves, for it is they which disclose to the native sensibility potential modes of its own creativeness.[5]

This truth has been widely recognized in the West from antiquity onward and, as the history of the Roman *ius gentium* illustrates, also in respect of law. In fact, no civilisation comes to mind in which "the other" has been studied quite as assiduously, and nowhere else has cultural diversity in art, religion and philosophy been celebrated as consistently as here. The main questions that perplex today are therefore the following: Why is the role of law not submitted to sensitive discriminating scrutiny by American specialists in foreign affairs? Why is it being tacitly assumed that men and governments everywhere trust or prefer contractual commitments in terms, for example, of constitutions, coalition governments, or treaties of peace? In short, and more broadly phrased, why is cultural diversity not recognized in the United States as a politically relevant factor, and why are foreign policies not cast deliberately in the frame of intercultural communication?[6]

## II

The factors that conduce to the obscuring of cultural identities in non-Western areas of the world and therefore also to the blocking of meaningful discourse and the faulting of foreign policies are obviously multiple and complex. For purposes of this paper two in particular will be cited. There is on the one hand the traditional, continuously pervasive image (now sorely tested) of the United States itself as a melting pot of people from everywhere who were willing to subordinate the memory of their ancestral past to the actuality of citizenship in a nationally unified state -- surely an emotionally compelling exemplar for the ordering of the confusing multicultural environment in the 20th century. The other major propositions which seem also to be read instinctively into the affairs of foreign states and the society of nations as a whole, relate primarily to the Anglo-Saxon law without which, of course, the United States could not have been conceived as a culture-transcendent nation, and, beyond that, to the combined legacies of the common law and the civil law by which all Occidental approaches to the organisation of society and the conduct of foreign policy have been informed in the last millennia.

In counterpoint to these tendencies it is here suggested that these experiences are unique in international history; that Occidental understandings of the meanings of law are not shared by non-Western nations; that interactions between law and foreign policy can by no means be assumed, and, in particular, that contractual modes of harmonising diverse national interests can serve only limited interests in the furtherance of international understanding. These themes cannot be fully

developed in a brief paper, and the following remarks are therefore merely suggestive of arguments and analyses that have been submitted elsewhere in more explicit fashion.[7]

Law has sweeping functions in Western culture as a paramount moral value, a directive for thought and reasoning, a preferred means of communication, a symbolic code capable of relaying other major norms and values, and as the axial principle of social behavior and political organisation because it has been isolated deliberately from such rival informing principles as religion, ethics, ideology, social tradition and political power. This achievement in abstraction explains, for example, why forms of government are customarily evaluated in terms of law; for whereas the former have been subject to continuous change in the West, legal systems, being synopses of fundamental convictions and commitments, have stubbornly survived the turmoil of the times, continuously releasing regenerative and corrective forces and thereby sustaining the civilisation as a whole. At least a passing acquaintance with Civil law, Anglo-Saxon law, Canon law and the various progenies of these basic jural orders is therefore all but indispensable for purposes of cultural self-definition as well as of cross-cultural communication and comparison. And in these respects it is important to remember that the major legal themes here stated were as dominant in classical Rome and medieval England as they are in 20th century Switzerland, Australia or the United States. That is to say, they did not evolve gradually in the course of time. The wide-spread modern view that acknowledgment of the primacy of law in national and international affairs is a mere

function of universally valid norms of political development does therefore not appear to be well founded.

The Occidental preference for constitutional rule and parliamentary procedures is a corollary of these general understandings of the pivotal role of law. In other words, in the absence of the latter, constitutionalism could not possibly have emerged. Furthermore and most importantly, this particular dimension of law related thought and practice is an extension into the public domain of the private law of contract - incomprehensible unless the logic of the connection with primary norms is clearly recognized. And contract, again, would be an empty, socially sterile reference if one would not remember that it can be fathomed as a mental construction only when the individual is recognized as the main legal entity, separate in law from family, clan, caste, social class, religious community, political party or any other group affiliation. These presuppositions, then, are absolutely necessary before one can assume that the individual is endowed with rights and responsibilities in his own behalf and that he is capable of making promises and accepting obligations voluntarily. In short, we speak of contract when the law can recognize the will of the parties and the ensuing meeting of minds.

This juristic theory of interpersonal communication and agreement, which originated in Roman thought, is the foundation of constitutionalism. From the days of Papinian European law and politics have thus revolved around two revolutionary propositions: firstly, that <u>all</u> law is a form of obligation binding not just the entire people but each of them personally, and secondly, that the constitution is a particular

pact or convention which secures the nation in a network of legally enforceable, mutually dependent rights and responsibilities.[8]

Finally, all normative systems covering inter-state relations in the Occident are derivatives of these common values and understandings of law and government. That is to say, in the international arena it has been democracy not despotism that has supplied the preferred models of behavior and organisation. Neither international law and international organisation nor classical European diplomacy can thus be comprehended unless their cultural roots in law and ethics are clearly recognized.

III

All foreign policies reflect the norms and values that dominate a nation's inner order. It is therefore by no means surprising that those emanating from Western capitals are marked by trust in the stabilising and structuring force of law; that diplomatic modes of communicating interests are decisively affected by legal thought and practice, and that intergovernmental understandings are preferably rendered in the contractual language of the treaty. Furthermore, and before contesting the validity of this orientation in the 20th century, the reminder is of course in order that the symbiosis between law and statecraft had indeed proved its worth as a rational contrivance in the restricted contexts of the Mediterranean and Atlantic regions in which states from classical antiquity onward had been able to achieve a remarkable measure of mutual understanding precisely because they had learnt to cultivate the shared inheritance of law. At any rate, the experiences thus registered in their own culture history appear to have persuaded modern generations of Europeans and Americans in the era of global politics that law in general and contract in particular are indispensable elements of government ready to be discovered everywhere by resort to analogy, and that societies not obviously organised along these principles are properly classed as politically undeveloped for the time being, in need therefore of temporary aid and guidance. In either situation, so the reasoning seems to run, foreign policy is rightly linked to law in its dual function as a body of socially imperative norms and as the best medium for world spanning communication. Contrary findings by scholarly experts in comparative culture studies have been available to policy

makers, from the days of Herodotus onward. Although most converged on Montesquieu's warning that the laws of one nation can never be suited to the wants of another nation since laws must harmonize with established norms of government, they somehow dropped from public consciousness whenever critical decisions had to be made in foreign affairs.

Some of the new levelling trends were nurtured in the period of Western dominance during which European laws were either borrowed quite voluntarily by non-Western nations (Turkey, Japan and China come to mind) in deference to their desire for technical modernization, or grafted upon native traditions in the exercise of colonial policies, as in Africa south of Sahara. For example, the early training program for French colonial administrators at the Ecole Coloniale was based on the premise that Roman law had universal validity. A course description at the turn of the century thus contained the following passage:

> "law is....a universal language.... He who has studied it will immediately recognize constant principles underlying superficial variations between different local laws.... There cannot be ten different ways to organize a family, to conceive of property or of a contract...."

This presumption was reversed only a few years later when observation and experience had convinced officials, notably Maurice Delafosse and Louis Vignon, that there are "...profound differences between the mentality of Europeans and that of Asians and Africans", and that instruction should stress the necessity of "studying the religion, customs, traditions, laws, social and administrative organization of the conquered native societies...."[10] In short, here as elsewhere in Europe the view gradually gained ground not only that there can be ten different ways to conceive

of a contract, but also that there may be cases in which contract and constitutionalism are incompatible with native social forms. For purposes of this presentation two brief illustrative references - one to Africa south of the Sahara, the other to China - must suffice.

The literature on Africa law in its pre-colonial, colonial and modern incarnations is now voluminous,*11 and it shows conclusively that one cannot find here the kind of juristic thinking in the abstract that one takes for granted in Europe and America; that it is illusory to try to define law in terms of Western legal conceptions, and that therefore no a priori theoretical model can be assumed.*12 In this originally nonliterate culture realm in which thought was ruled by custom, magic and religion, law was not disengaged from the sum total of informing norms and values; nor was the person recognized as a separate legal entity endowed with inalienable individualized rights. No equivalent for the Western notion of contract could possibly have arisen in such circumstances. What Africans developed instead was an acute sense of social obligation, for the stress in each of their numerous self-contained communities has always been on the primacy of kinship relations and the interests of the group. The introduction, by colonial administrations, of contractual conceptions was thus bound to make for uneasy syncretisms on the levels of both, private and public law, and these have naturally become increasingly overt in modern times if only because political independence has had the undeniable effect of rehabilitating the pre-colonial past.

This disjunction in the relationship between two coexisting legal orders, which is mutatis mutandis a break in intercultural communication, is apt to confuse human behavior and political processes, as the following account of the socalled Crocodile case in Malawi suggests.

"A man wished to rid himself of a tiresome wife, and approached a reputed sorcerer, who for consideration of one pound down, and a subsequent one upon completion of the contract, agreed to become a crocodile and take the wife. He did, and the liberated husband refused the further pound, whereupon the injured party took the matter to court and won on breach of contract. Only when news of this reached the Ministry of Justice was an investigation launched, and this led, eventually, to charges of murder against both men."[13]

The two decisions here in issue make, of course, no sense in the context of traditional society. Here where magic and witchcraft are openly accepted facts of life, where the legality or illegality of a contract is at best an irrelevant issue, and where the cause of communal order is all that matters, it would have been up to the murdered wife's family to settle the case by seeking retribution in the form of either blood or material compensation. The Malawian parliament--a creature of contract and English policy--showed its awareness of these incongruities in a subsequent debate on the implications of another recent case, the Blantyre ax murders (1968-70).*[14] Forceful arguments seem to have been made on that occasion in support of the proposition that English modes of reasoning, conceptions of criminality, laws of evidence, and, in particular, approaches to punishment were not concordant either with Malawian customs or with present national interests. Here as in most other modern African states, people in all walks of life are returning to traditional patterns of behavior and belief, and governments, whether tyrannical or tolerant, are reinstating pre-colonial social

controls so as to retain their present powers. This has become vividly evident in the dismantling of constitutional forms of rule and the recent rash of harsh penal laws and repressive executive actions that stipulate death and mutilation as fit penalties for offences that do not rate such retribution under either the civil law or the common law.

Anthropologists and members of the legal profession specialising in African affairs were quite prepared for these post-independence developments in criminal and constitutional law because they were familiar, by and large, with the socially compelling elementary ideas that had kept African societies going for centuries. Professional diplomatic elites, by contrast, appear to have been taken by surprise too often. For example, two American envoys who had been on extended missions in Guinea during 1961-65 found themselves in a state of "shock" and "disbelief" in 1971[15] when they learnt that dissent from Sékou Touré's policies brought endless rounds of executions, public hangings, extortions of confessions, and crowded jails; for had they not initiated and carried on "a substantial program of economic assistance in Guinea, indeed one of the largest per capita aid programs this country had in all of Africa", and this "despite the fact that President Touré's generally Marxist political pronouncements seemed hardly in accord with American thinking". "No country", they concluded, " - surely not the United States or the People's Republic of China or the Soviet Union - can afford to act within the context of Sékou Touré's concept of independence."

Well, many countries can do just that, among them the communist states with which the United States is being paired by the aforementioned American

ambassadors. That is to say, the available evidence shows rather clearly that ignorance or avoidance of the rule of law does not have the effect of faulting non-Western foreign policies. Conversely it teaches that Occidental foreign programs are apt to fail when cultural realities, among them the presence or absence of law, are disregarded or misunderstood. As the noted sinologist I. A. Richards warned in connection with comments on the difficulty of translating Chinese,*[16] the process of understanding should never be confused with reading our own conceptions into the past and present records of others. And the same fundamental theme has been elaborated by Bernhard Karlgren[17] and Marcel Granet[18] in their penetrating analyses of Chinese modes of thought.

In this great East Asian civilisation as in that of pre-20th century Japan analogues cannot be found for Western law or Western notions of agreement.[19] The ruling principle of order in the traditional Chinese realm was the sinocentric ideology of the Heavenly Mandate, and this was administered not through impersonal laws, legislatures, federal devices and judicial systems, but through the mechanisms of family ethics and social ritual, on the one hand, and of an elaborate administrative bureaucracy on the other. The first carried the full authority of the Confucian school, the second that of the Legalists.[20] All meanings carried by "law" in pre-Maoist China derived from the operation and interaction of these two sets of principles. Thus it was only when social order could not be maintained by reliance on the separate codes of behavior which inhered in each of the carefully graded, classical five relationships that administrative "law" was invoked and it operated vertically from state upon subject

rather than horizontally and directly between individuals.[21] Furthermore, and as classical Chinese literature makes abundantly clear, law was so overwhelmingly penal in emphasis as to become tantamount to punishment. Indeed, governments held fast to the view that one must punish severely so that one will not have to punish again.[22] Contractual law, then, had no place either in the Legalist or the Confucian system, for the latter's stress on rigid gradations in family and class relations made inequality the basic norm. Within this social milieu, consensus and conciliation were assiduously sought, but autonomous individual intentions - the prerequisite for contract - could not emerge. And the same holds true, by definition, of civil rights and constitutional frames of rule.

Peking's foreign policies relayed each of these motifs. The pivotal notion of the Middle Kingdom's absolute supremacy over all other peoples near and far was thus administered consistently either by indirect diplomatic controls which relied heavily on ritual and were always carefully adjusted to the particular susceptibilities of each inferior nation, or, if these were insufficient, by punitive military expeditions. East Asian and Occidental diplomatic methods were thus clearly incompatible in inception. They proved to be just that also in practice, as when representatives of China and Korea on the one hand, and England and the U.S. on the other, recognized on separate occasions in the 19th century that they could not decipher each other's "codes" of international communication. The main factor making for these "dialogues des sourds" was the absence in China of any guidelines comparable to international law, and the insistence mixed with bewilderment, on the part of Western diplomats to read legal definitions

of the state and inter-state accords into the culturally alien order they had entered.[23] Their Chinese counterparts eventually complied with the Occidental pattern of coupling foreign policy concerns with international law, but they did so only after they had successfully invoked the principles found in Wheaton's Elements of International Law (which had been translated into Chinese by an American missionary) in a dispute with Prussia. At that time, Jerome Alan Cohen notes,*[24] certain Mandarins recognized that international law could be a useful defensive weapon. In short, reliance on law in our dealings with pre-Maoist China had not facilitated sound and meaningful intercultural relations, even though it may have conduced to short-term gains in foreign policy. And - it is here suggested - the same general conclusion holds in regard to relations with Maoist China.

In support of this thesis it should be recalled that the present leadership subscribes explicitly to Legalist and selected Confucian axioms of statecraft, and that most if not all of these are fully compatible with Marxism-Leninism, the primary fount of Maoist thought and practice. Since all guidelines converge on refuting law as a basic norm and contract as a meaningful form of human communication, it is not surprising to find that references to law are missing not only in Mao Tse-tung's voluminous pronouncements but also in accounts of China's modern intellectual life.[25] The ruling precepts in the Maoist order are thus wholly different from, indeed opposite to those taken for granted in the West, for they are corollaries of a dialectical mode of thinking and reasoning -- conceived by Marx and Engels and elaborated by Lenin, Stalin and Mao - that stipulates the absolute need for contradictions and presents conflict

development as the essential form of progress in both nature and society. The aim of social and political organisation is thus not stability, harmony or the reconciliation of opposites, but rather continuous friction as represented in the class struggle and permanent revolution. Furthermore, the key to success in the administration of conflict development is political power, and the latter, again, is conceived in the dialectics of command and obedience. When command generates disobedience, mental or physical coercion follow as a matter of course, for as Mao Tse-tung explains it authoritatively, contradictions among the people are the very forces that move a socialist society forward.[26] Conversely, if there were no contradictions in the communist party, and no struggle to resolve them, the party's life would come to an end.[27]

Law, then, is practically irrelevant as a structuring principle of government on local and regional levels and as an objective measure of the rights and obligations, respectively, of the ruler and the ruled. The concepts of private contract and public constitution can thus not be accomodated in the Chinese vision of the new collective conformism. The situation is altogether different, however, in the field of foreign relations where the Maoist regime frequently resorts to rules of international law, notably in respect of the law of treaties. This practice, which has only shallow roots in pre-communist Chinese culture,[28] is the direct, albeit sinified, outgrowth of Marxist theory and Leninist-Stalinist approaches to the role of law in society.

In all Marxist literature, law is represented as a mere superstructure, devised by economically dominant classes for the sole purpose of exploiting

the underprivileged. As such, the theory holds, it will wither away along with the state when the perfect communist society comes into being. As Conquest points out,[29] this continues to be an article of faith in the ranks of believers, even though compromises have been made by the Soviet leadership in the last half century. For example, Stalin and Vyshinsky[30] found it necessary, for purposes of local administration, to devise a system of socialist law - wholly different, they argued, from the despised bourgeois law - after they had come to realize that law was a handier weapon than unregulated coercion in the fight against enemies of monolithic party rule. And the records of the purge trials of 1936-38 over which Vyshinsky presided, as well as numerous other recorded aspects of the administration of justice, illustrate convincingly that law was indeed used effectively to legalize or dissimulate naked executive power, or, to put it differently,[31] to help pave the way to its own elimination.

Since communist views of the function of law are diametrically opposed to those held in the West, it would be as illusionist today as it proved to be after the Second World War to entrust such national interests as the political organisation of weak and strategically vulnerable nations to the (presumed) normative force of constitutional law, coalition government or democratic electoral processes. And similar reservations about law as a reliable medium of mental and political communication with communist regimes attach to the utilization of international law. Indeed Soviet spokesmen had given early notice to their friends and adversaries that the Soviet Union would accept only those international customs which are not in contradiction with the socialist

legal conscience, and that only explicit agreements between the two opposing camps could be recognized as binding norms. In any discussion of the relation between law and foreign policy it is thus the treaty which deserves primary attention.

In their survey of more than 40 years of Soviet treaty theory and policy, Triska and Slusser[32] restate the consensus of Soviet authorities to the effect that treaties are but juridical expressions of the actual correlation of social and economic forces in the world. Being "only" formal legal norms, devoid of intrinsic validity however solemnly proclaimed, they can in no way modify "the furious class struggle"[33] in terms of which all foreign relations must be conducted until victory is won.

In the Soviet conflict system, then, in which peaceful coexistence with the enemies of socialism is still defined as a specific form of struggle, capitalist or imperialist treaties are by definition unequal, enslaving, predatory and coercive. However, although they are considered "unlawful" and thus subject to repudiation by the Soviet state, they have been valued consistently as tactically desirable devices in much the same way as popular front coalitions have commended themselves as weapons in communist programs of penetrating non-communist states.

In the logic of this world view it goes without saying that treaties binding Asian and African states among themselves, in the spirit, for example, of the Bandung Conference, have been rated favorably. For since they are presumed to conduce to a contraction of the imperialist power sphere, they are said to contribute to the evolution of a "true" international law. However, the only really progressive accords are those

concluded between socialist states. This category includes the agreement between the USSR and the Mongolian People's Republic, all treaties with Eastern European states that led either to their incorporation in the USSR, or to the consolidation of the Soviet Bloc by means, for example, of the Warsaw Pact and the Brezchnev Doctrine with its authoritative modern exposition of "socialist international law" and, of course, the early accords with the Chinese People's Republic.[34]

The records of Maoist alliance politics between 1949 when the Sino-Soviet Friendship Pact was concluded, and 1971-72 when accords with the United States were being initiated, show convincingly that China has acceded to the Soviet restatement or usage of international law even as it has remained true to purely Chinese precepts of statecraft.[35] The easy blend of these major references and their convergence on the tactics of intellectual deception is illustrated well by the Sino-Indian Agreement on Trade with Tibet (1954).[36]

The preamble to this accord, the socalled panca-sila, - which China was to employ thereafter in numerous other treaties with Asian and African states - is officially identified with Buddhist ethics, a religious persuasion that was quite alien to Nehru and Chou En-lai and had long been uprooted in the lands they represented. The particular allusion was spurious also in the sense that the 5 principles were misrepresented. As formulated by the Buddha, individual believers were admonished to avoid the destruction of life, theft, unchastity, lying, and the use of intoxicating liquor. As rendered by the Sino-Indian negotiators, however, they stipulated mutual respect for each other's

territorial integrity and sovereignty; nonaggression; noninterference in each other's affairs; equality and mutual advantage; and peaceful coexistence and economic cooperation--provisions readily found in such typically Western collections of international norms as the Charter of the United Nations.

Now it is common knowledge that neither of the precepts was observed in relation to Tibet. Following Sun Tzu's advice as amplified by Mao that one can a oid battles when one hits the mind of an opponent, Peking used both Buddhism and traditional Western international law as stratagems of deception so as to dissimulate its own intentions and confuse the Indian perception of reality by creating false "shapes" (Sun Tzu) or "illusions" (in Mao's paraphrase of the old master).[37] Having outwitted India's representatives who trusted the Asian house of friendship as well as the Occidental system of law in which they had been tutored, the Chinese were free to conquer Tibet and deprive their great Asian neighbor to the south of long-standing strategic advantages on the all-important Himalayan frontier.

Western responses to this crisis were of the same order as those devised by Mr. Nehru. On the analogy of the somewhat sterile communications regarding the Korean issue at the end of the last century,[38] they were evidently initiated without sufficient prior scrutiny of the relevance of international law in modern inter-Asian relations. The status of Tibet, a vast non-Chinese, nonsinified realm, was thus not viewed in the light of almost 2000 years of cultural and political independence under a variety of indigenous governments - none definable in Occidental

legal terms - but rather in that cast by treaties and other understandings that had been registered in the halcyon days of Western dominance. Acquiescence in China's military aggression and subsequent establishment of unlimited hegemony was therefore considered legally proper or at least defensible, even though it was predictable already in the 1950s that this passive posture would have altogether adverse effects upon the furtherance of the American intention to defend the territorial integrity of Southern Asian nations.

Now it is as noteworthy as it is ironical in this respect that Maoist China and the Soviet Union have become ardent advocates of international law, both "capitalist" and "socialist", when they began contesting their respective Central Asian boundaries. Adept in the art of "struggling while negotiating", they knew how to combine open battles and guerrilla tactics with protracted semantic battles of conflicting treaty references during which the Soviets felt free to cite tsarist treaties in opposition to Maoist complaints that all pre-1917 Russo-Chinese border treaties were "unequal" and hence invalid on the ground that power had in those days not been in the hands of the people.[39] In the camp of socialism, then, intercultural communication is often closely linked to international law, but this is so only because communist states agree in appreciating it as a valuable defensive weapon. The situation is altogether different in the modern Occidental world. Here conflict is seen as an aberration ascribable to faulty communication;[40] the normal world condition is still commonly described as "peace", and reliable inter-state communications continue to be identified with vocabularies of law related concepts,

notably the treaty that assures reconciliation, order, cessation of hostilities, and, above all, peace. For just as the word "peace" is akin to the word "pact" (see Webster's Standard College Dictionary), so does the idea of peace between culturally different societies apparently evoke in Western thinking the notion of a pact to preserve the peace. These assumptions are now out of date. As the Japanese foreign minister reminded us this year in the course of comments mentioned earlier, "peace" as understood by the United States is not tantamount to stability. Thus it is difficult to imagine, he continued, that in the foreseeable future there will be real stability in Southeast Asia, even if "peace" for Vietnam is proclaimed in the legal language of a pact. Here, in communist Eurasia, Africa south of the Sahara, and the Middle East, U.S. foreign policies must deal with conflict systems, greatly various to be sure, yet all impervious for the time being, to pacification or stabilization by resort to law. Each of them is subject to change and transformation, and so are modes of intercultural communication.[41] But policy-makers in the West can affect these processes only after they have made each system the object of analysis and cross-cultural comparison.

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1973

1. New York Times, January 26, 1973, p. 10.

2. This refers to the American failure first, to consult with Japan when a new relationship to Mainland China was initiated in 1971, and second, to invite Japan to the post-war conference on Indochina.

3. See, for example, Ruth Benedict, The Chrysantemum and the Sword; Patterns of Japanese Culture, Boston, 1946. For a stimulating juxtaposition of Japan's Meiji Constitution of 1889 on one hand, and European, notably German, public law on the other, see Richard H. Minear, Japanese Tradition and Western Law; Emperor, State, and Law in the Thought of Hozumi Yatsuka, Harvard University Press, Cambridge, Mass., 1970, especially pp. 84-147. According to Hozumi who tried to explain Japanese politics and law to a Western audience, the Meiji Constitution is an authorized, not a contractual, constitution (p. 97): it emerged wholly from the august solicitude of the emperor. The abolition of the constitution is therefore a real option for the sovereign who is not bound by any moral obligation (109). Commenting, for example, on the budget, Hozumi writes: "... Rather than being a co-operative treaty between equals - the diet and the government - the budget is like a command whereby the diet oversees the government". In short, "Our budget system has no history like that to be seen in Europe.... The budget, like the laws, is not a compact between the government and Diet..." (p. 129). Minear concludes this analysis by saying that "... Hozumi's writings have a thrust distinctly different from that of his Western informants... For this reason we must look to traditional Japanese

ideas about the state and the emperor, not to Western legal theories, for the genealogy of the ideas of Hozumi Yatsuka." (p. 147) And in respect to these Oriental traditions, again, Minear points out that the Confucian tradition in China and in Japan hindered the development of a concept of law analogous to that which emerged in the West. (p. 177)

4. Recent discussions of certain unexpected tendencies in the evolution of the Japanese Supreme Court, originally modelled on the American equivalent, also illustrate the point here made. See Professor Hiroyuki Hata's review of Mauro Cappelletti, Judicial Review in the Contemporary World, Indianapolis, 1971, in Columbia Journal of Transnational Law, vol. II, Winter 1972, No. 1, pp. 176 ff.

5. Oswald Spengler, The Decline of the West, (One Volume Edition), New York, 1930, vol. II, p. 57

6. Cp. Glenn H. Fisher, Public Diplomacy and the Behavioral Sciences, Bloomington, Indiana, and London, 1972, p. 84 to the effect that cultures are virtually never viewed as integrated wholes either by American social scientists or by foreign affairs officers.

7. Bozeman, The Future of Law in a Multicultural World, Princeton University Press, 1971. On "Contract" see ch. 2, pp. 34 ff.

8. On the history of these systems of ideas see Charles Howard McIlwain, Constitutionalism Ancient and Modern, Ithaca, New York, 1940, 52, 71, 89;
Sir Henry Maine, Ancient Law, 3rd American ed., New York, 1879, 23,

304 ff, 313 ff; also The Early History of Institutions, New York, 1888, 312;

also T. H. Green, Lectures on the Principles of Political Obligation, (first published in 1882), Ann Arbor paperback, The University of Michigan Press, 1967, 29-48; 142-180; for a summary/discussion of the issues, Bozeman, Politics and Culture in International History, Princeton University Press, 1960, 184 ff

See also Edmund S. Glenn, "The Two Faces of Nationalism", (unpubl. paper), pp. 4, pointing to naturalization as an explicit contractual arrangement specifying the obligations and the privileges of both parties - the individual and the administration.

9. William B. Cohen, Rulers of Empire: the French Colonial Service in Africa, Hoover Institution Press, Stanford University, 1971, p. 45.
10. Ibid., p. 49.
11. For extensive bibliographical references in support of these propositions see Bozeman, The Future of Law in a Multicultural World, pp. 102-112, notes 86-109
12. Antony Allott, Essays in African Law, with Special Reference to the Law of Ghana, London, 1960, p. 67;

Jan Vansina, "A Traditional Legal System: The Kuba" in H. and L. Kuper, eds., African Law: Adaptation and Development, Los Angeles, 1966, p. 117;

Paul Bohannan, Social Anthropology, New York, 1963, p. 283; also the same author's Justice and Judgment among the Tiv, London, 1957.

13. James R. Hooker, Tradition and "Traditional Courts": Malawi's Experiment in Law, American Universities Field Staff, Fieldstaff Reports, Africa, vol. XV, No. 3, March, 1971, pp. 1-2

14. Ibid., p. 4

15. William Attwood and James I. Loeb, "Letter to the Editor", New York Times, December 14, 1971. Compare this with Charles Andrain, "The Political Thought of Sékou Touré", in African Political Thought: Lumumba, Nkrumah, and Touré, ed. W. A. E. Skurnik, Monograph Series in World Affairs, vol. 5, no. 2, Denver, Colo., 1968, pp. 125 ff, and with L. C. B. Gower, Independent Africa: The Challenge to the Legal Profession, Cambridge, Mass., 1964, expecially p. 78.

16. Mencius on the Mind: Experiments in Multiple Definition, London, 1932

17. Sound and Symbol in Chinese, London, 1946, especially pp. 84-89

18. La Pensée Chinoise, Paris, 1934, pp. 22, 78, 130, 332

19. See in particular Jean Escarra, Le Droit Chinois, Peking and Paris 1936; Derk Bodde and Clarence Morris, Law in Imperial China, Exemplified by 190 Ch'ing Dynasty Cases, Harvard University Press, Cambridge, Mass., 1967, pp. 3 f to the effect that Chinese society was by no means a legally oriented society.

    For extended bibliographical references and discussions see Bozeman, The Future of Law in a Multicultural Environment, ch. V "China".

20. The Legalists or Realists -- also called by Arthur Waley the Amoralists -- developed their doctrine in the period of the Warring States and were responsible for the first unification of China in the third century B.C. The school's most illustrious represen-

tatives are Han Fei Tzu, Sun Tzu, and Lord Shang. Their works are fully analysed by Arthur Waley, Three Ways of Thought in Ancient China, London, first publ. 1939, third impression, 1953, and by Escarra, op.cit. As Escarra notes on pp. 31, 39, 59, 436, the Legalists were returned to influence deliberately in the 20th century and modern Chinese legislation thus came to reflect their influence.

21. Bodde and Morris, op.cit., p. 3 ff

22. For a full treatment of this aspect of Chinese law see T'ung-tsu Ch'ü, Law and Society in Traditional China, Paris and the Hague, 1961; cp. Waley, op.cit., pp. 209 ff, p. 210 n.2. See Escarra, op.cit., pp. 97 ff to the effect that the T'ang Code which originated actually in the remote period of the Warring States, was diffused to Annam, and that the Ming Code was carried to Japan and Korea.

23. See Bozeman, op.cit., pp. 148-151 and authorities there cited.

24. "Chinese Attitudes toward International Law - and our Own", Proceedings, American Society of International Law, April, 1967, pp. 108 ff. Cohen points out that the mandarins had at first been suspicious of the Wheaton volume, viewing it as the Trojans did the gift of the Greeks.

25. Wing-tsit Chan, Chinese Philosophy, 1949-1963: An Annotated Bibliography of Mainland China Publications, Honolulu, 1967. It is interesting to find that Han Fei Tzu, one of the leading Legalists, is classified as a reactionary representative of the newly arising

landlord class, and that Mencius, a Confucian, comes off well with his strong accent on rightful war. Mao's main Legalist authority is Sun Tzu.

For a brief analysis of these convergent "operational codes" see Bozeman, "The Sources of Chinese Statecraft", The New Leader, January 10, 1972.

26. Mao Tse-tung, "On Contradiction", Selected Works, New York, International Publishers, (n.d.), II, p. 19, 28.

For the best analysis of "conflict development" as a normative concept, see George D. Damien, "The Dialectical Structure of the Chinese Great Proletarian Cultural Revolution", Orbis, vol. XIV, Spring 1970, no. 1, pp. 192-217.

27. Damien, loc.cit., 214.

Mao is quoted as having stated in 1967 that the present great cultural revolution is only the first, and that in the future there are bound to be others. See Martin K. Whyte, "Red vs. Expert", Problems of Communism, Nov.-Dec., 1972, pp. 18-27, for this reference and an account of this particular contradiction.

28. See preceding references

29. Robert Conquest, Justice and the Legal System in the USSR, New York, 1968, p. 73; see also ibid., 74, 110, 137; and, by the same author, The Great Terror, New York, 1968.

Cp. also on this general subject John N. Hazard, The Soviet Legal System, New York, 1962; Harold J. Berman, Justice in the U.S.S.R., Cambridge, Mass., 1966, and Samuel Kucherov, The Organs of Soviet

Administration of Justice: Their History and Operation, Leiden, 1970. This author makes the point (p. 686) that Stalin's and Vyshinsky's views of "legality" were put forth precisely to cover up the rule of violence over which they presided in the 1930s.

30. Andrei Y. Vyshinsky, The Law of the Soviet State, New York, 1948 on the process of rehabilitating law for Soviet purposes.

31. Conquest, Justice and the Legal System in the USSR, p. 15
On the dissimulation of dictatorships by "constitutions", see G. Sartori, "Constitutionalism", American Political Science Review, vol. 56, December 1962, pp. 853-865

32. Jan F. Triska and Robert M. Slusser, The Theory, Law and Policy of Soviet Treaties, Stanford University Press, Stanford, Calif. 1962; see also Triska, "Soviet Treaty Law: A Quantitative Analysis", in Hans W. Baade, ed., The Soviet Impact on International Law, Oceana, Dobbs Ferry, N. Y., 1965, pp. 52-65.

33. Triska and Slusser, op.cit., 176 ff; 212 ff; 404; p. 401 to the effect that agreements on cultural exchange are most likely to yield satisfactory results to both sides, if only because such an accord offers the Soviet Union opportunities for cultural and political penetration

34. Ibid., 217-225. On these relations
See also Douglas M. Johnston, "Treaty Analysis and Communist China: Preliminary Observations", Proceedings, American Society of International Law, 1967, pp. 136 ff; p. 135; Richard C. Thornton, The Bear and the Dragon, Sino-Soviet Relations and the Political

Evolution of the Chinese People's Republic, 1949-1971, (Monograph Series No. 9 of the American-Asian Educational Exchange), 1972, and Thomas W. Robinson, "The Sino-Soviet Border Dispute: Background, Development, and the March 1969 Clashes," APSR, vol. LXVI, Dec. 1972, No. 4, pp. 1175-1202.

35. Cp. supra, p..

36. This treaty is discussed in Bozeman, "India's Foreign Policy Today: Reflections upon its Sources", World Politics, vol. X, No. 2, January 1958, pp. 256-273

37. For an admirably lucid exposition of these aspects of Chinese military statecraft see Scott A. Boorman, "Deception in Chinese Strategy: Some Theoretical Notes on the Sun-Tzu and Game Theory", Forthcoming in: Colonel William W. Whitson, USA (Ed.), The Military and Political Power in China, New York, 1973;
Also by the same author, "Strategy and National Psychology in China" in Don Martindale (ed.), "National Character in the Perspective of the Social Sciences", The Annals of the American Academy of Political and Social Science, vol. 370, 1967, pp. 143-155.

38. Cp. supra, p...

39. For a full account of these developments as they unfolded in the 1960s, see Robinson, loc. cit., especially pp. 1178-1182.

40. For this formulation see Charles Burton Marshall, The Limits of Foreign Policy (Enlarged Edition), Baltimore, 1968, p. 134

41. See Michael J. Flack, "Thoughts Concerning Civilizational Change", Prepared for the Panel on "Scope, Methods, and Current Issues in The Comparative Study of Civilizations", 139th Annual Meeting of the American Association for the Advancement of Science, Washington, D.C., 1972.

Bozeman, Politics and Culture in International History, Princeton, 1960, for numerous historical case studies of cultural borrowing, and transformation.

And J. J. Bachhofen's pioneering work, Myth, Religion, and Mother Right, Selected Writings, tr. by Ralph Mannheim, with a preface by George Boas and an introduction by Joseph Campbell, (Bollingen Series LXXXIV), Princeton, 1967, p. 245:

"Because of its spiritual nature a tradition cannot possibly be free from change and development, but must be affected by transformations in habits of thought. Thus in the course of the centuries different types of tradition arise, each according to a definite formative law. Consequently the work of truly objective explanation must be done not once, but as often as the phenomena change. The links in this succession must be kept carefully apart; the formative law of each one must be explained only through the phenomenon itself, and in the language appropriate to it..."

For an illuminating study of "change" in regard to international law, see Josef L. Kunz, The Changing Law of Nations, Essays on International Law, Columbus, Ohio, 1968